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No. 95-251

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

REPUBLIC WASTE INDUSTRIES, INC.,

Petitioner,

vs.

G.I. INDUSTRIES,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION
AND
REQUEST FOR SANCTIONS

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QUESTION PRESENTED

Should petitioner be sanctioned for filing a frivolous petition for writ of certiorari?

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BRIEF IN OPPOSITION AND REQUEST FOR SANCTIONS

Respondent G.I. Industries ("G.I.")[1] respectfully prays that the Petition for Writ of Certiorari by Republic Waste Industries, Inc. ("petitioner") be denied.

[1] Respondent G.I. Industries has no parent companies and no non-wholly owned subsidiaries.

SUMMARY OF REASONS FOR DENYING THE WRIT

1. The decision of the Ninth Circuit was in an *unpublished* memorandum. The underlying case turns on interpretation of a portion of a unique, negotiated contract which is *sui generis*. The petition meets none of the requirements of this Court's Rule 10. There are no special, important or compelling reasons to grant the petition; there are no conflicting decisions of the courts of appeals; there is no federal question involved; there is no state court involved; and there has been neither a departure from the accepted or usual course of judicial proceedings nor any other reason to call for the exercise of this Court's power of supervision.

2. The Ninth Circuit held that, under the facts of the case and the express term of the Agreement involved, petitioner could not take advantage of the so-called walk-away date since petitioner had previously repudiated the agreement and was in breach. The decision of the Ninth Circuit was correct. The petition avoids the real issue in the case, and relies on half-truths and misrepresentations of the record.

3. The petition is frivolous, filed for delay.

COUNTER-STATEMENT OF THE CASE

Petitioner's "Statement of the Case" is argumentative[2] and wrong:

Contrary to the petition [at p. 3], the Ninth Circuit did *not* "eviscerate the concept of proximate causation in contract cases," and it did not eviscerate anything else. Similarly, the Ninth Circuit did *not* eliminate the "requirement that plaintiffs prove a causal nexus" and it did not eliminate any other requirements of contract law.

Contrary to the petition [at p. 3], there was *no* "contractual walkaway date" available to petitioner under the facts of this case.

Contrary to the petition [at p. 4], Republic did not "terminate" the Agreement; Republic repudiated and breached the Agreement.

Contrary to the petition [at p. 5], January 31, 1991 was *not* "the date petitioner could have walked away from the Merger Agreement with no penalty"; petitioner could have walked away only if it was not then in breach (which it was).

Contrary to the petition [at p. 5], the "central issue" was *not* whether, between December 19, 1990 and January 31, 1991, the parties "could have completed all tasks . . . needed . . . to close the merger." The central issue was whether the January 31, 1991 date had any application at

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[2] "It . . . bears emphasis that the Statement of the Case is not the place for argument or editorializing; . . . . " Stern, Gressman, Shapiro and Geller, *Supreme Court Practice* 353 (7th Edition 1993).

all in the particular contract and under the particular facts.

Contrary to the petition [at p. 9], the Ninth Circuit did not "expressly" (or otherwise) reject the ready, willing and able test of proximate causation as a general principle. What the Ninth Circuit held was that, in the light of the express requirements of paragraph 12.2 of the particular contract at issue, there was no issue as to the application of that principle. [Pet. App. A, pp. A4-A5.]

Contrary to the petition [at p. 9], Judge Boochever did *not* recommend that a hearing *en banc* be granted. The Order [Pet. App. A, p. A9] on its face shows that Judge Boochever recommended *denial* of the suggestion for rehearing *en banc*.[3] Petitioner's concept that Judge Boochever recommended a rehearing *en banc* to reverse his own decision, is not only wrong but also defies common sense.

REASONS FOR DENYING THE WRIT

I.

The Petition Does Not Approach, Let Alone Meet, The Requirements Of This Court's Rule 10

The underlying case is one arising under state law; it turns on the interpretation, in the context of specific facts, of certain unique provisions of a contract which is *sui generis*. The Ninth Circuit's decision is in an unpublished memorandum, which cannot be cited as authority, and

[3] Of course, Judge Boochever, being on senior status, could not vote directly and could only "recommend."

which is not likely even to be known about by anyone other than the parties. The underlying case is both a diversity case and fact-specific [e.g., see Pet. pp. 5-8]. Petitions in such cases are commonly recognized as being in the categories of matters before this Court which are repeatedly described as frivolous.[4]

This Court's voice is needed in situations of great national importance. The instant case is not even close to being such a matter. As stated in Stern, et al., *supra* note 2, at 354:

> " '[T]he question at the certiorari stage is where and when the Court ought to be making law. Is this area of the law badly in need of the Supreme Court's authoritative voice? Is this case likely to produce an opinion that will give guidance to the lower court? What would be the national impact of letting the lower court decision stand?'. . . . "

The answers for this case are resoundingly "no", "no", and "none". While this case is important to the parties, it has *no* national impact at all.

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[4] E.g., H.W. Perry, Jr., *Deciding to Decide* 223 (Harvard University Press 1991): "After 'absurd' cases, three categories of cases were repeatedly described as frivolous: fact-specific cases, insufficient evidence cases, and diversity cases. . . . " [Certain of the petition's arguments go beyond the frivolous to the absurd. Thus, petitioner's due process argument [Pet. pp. 17-19] is the functional equivalent to the following "good example" of absurdity [cited by Perry at p. 222]: "[There was] a case once that said 'it was unconstitutional because my wife got up out of bed and left me alone on Christmas Eve.' "]

In an attempt to fabricate an "importance" to the petition, the petition claims [at p. 19], that the Ninth Circuit's decision somehow threatens "the global economy." Nowhere does the petition attempt to explain how a single, unpublished memorandum, unknown to anyone but the parties, can affect the "global economy" or otherwise present an issue of importance within the meaning of Rule 10.

II.

The Ninth Circuit Decision Is Correct

The Ninth Circuit decision is logical, consistent with the parties' contract, and legally sound.

Petitioner's attack on the Ninth Circuit's decision is a mixture of irrelevancies and misrepresentations as to what was at issue. The Ninth Circuit did not fail to recognize the principle of causation or the principle that damages are limited to what would have been gained by full performance or any other principle of law. What petitioner does is to pretend that certain clauses and sections of the contract did not exist. Petitioner's entire argument is predicated on the concept that the January 31 date was critical. However, as the Ninth Circuit determined [Pet. App. A, p. A5], "the parties here did not contract for a merger 'consummated by January 31, 1991.' Rather, the closing date of the merger was unspecified." Moreover, as the Ninth Circuit further determined [Pet. App. A, p. A5], the *"contract did not require G.I. to perform*

its duties by that date, . . . the *Ersa Grae* rule should never have been invoked."[5]

REASONS FOR SANCTIONS

The petition is totally frivolous. It is as far from being important or special within the meaning of Rule 10 as Pittsburgh is from Alpha Centauri. Moreover, at no point (including specifically its Statement of the Case) does the petition fairly and accurately depict the basis of the Ninth Circuit decision.

Petitioner should be sanctioned. G.I. recognizes that this Court does not frequently impose sanctions under Rule 42.2. Presumably one of the reasons is that "there are many cases that are obviously uncertworthy and can be so adjudged very quickly by a clerk." Perry, *supra* note 4, at 226. Notwithstanding this practical resolution, the filing of frivolous petitions must be a burden to this Court and, in any event, this one is unfair to G.I., which under the present rules, is forced to expend time and money in response to the petition.

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[5] Petitioner claims that the Ninth Circuit did not understand *Ersa Grae*. Even if this were so, which it is *not*, the *issue* remains *un*important. E.g., see Perry, *supra* note 4, at 224, quoting an unnamed justice as to an "example of an obvious denial" [of certiorari]:

> "A diversity case. When the Court of Appeals didn't appear to understand the law of Arkansas. But that is clearly not the job of the [U.S.] Supreme Court. It is the responsibility of the Supreme Court of the State of Arkansas."

The situation is particularly egregious here since, as revealed by the petition itself [at p. 3], petitioner is a corporation "publicly traded on the NASDAG [sic] and Toronto Stock Exchanges" whereas "G.I. is currently in a Chapter 11 bankruptcy proceeding." By filing this frivolous petition, petitioner burdens G.I.'s Bankrupt Estate by requiring the expenditure of substantial sums of money.

The petition [at p. 20] makes the emotional (and, as to the instant case, inapposite) pitch that "[t]his country's courts are already overburdened with cases brought by parties seeking to use the litigation process to garner unfair profits." G.I. respectfully suggests that the petition has been used here to burden this Honorable Court and G.I. for no purpose other than to obtain a *de facto* delay in the resolution of this matter – that is, in the hope that the District Court upon remand will delay proceedings waiting to see what happens to the petition. The situation cries out for sanctions, and it is respectfully submitted that they should be granted.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied, and sanctions should be awarded.

DATED: August 25, 1995

Respectfully submitted,

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